In the Supreme Court of the United States

October Term, 1978

No. 78-1748

STAN LEAVITT, GLEN LEAVITT
and LEE JOHNSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Jackson Howard
Robert C. Fillerup
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

Attorneys for Petitioners

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The petitioners, Stan Leavitt, Glen Leavitt, and Lee Johnson, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on April 23, 1979.

OPINIONS BELOW

On December 13, 1977, after a trial held before Chief Judge Willis Ritter in the United States District Court for the District of Utah, a jury found petitioners guilty of violation of 18 U.S.C. §641. Sentence was imposed on January 25, 1978.

The final, as yet unpublished opinion of the Court of Appeals for the Tenth Circuit (hereafter "Court of Appeals".) entered after rehearing without oral argument on April 23, 1979, is reproduced in full in Appendix A of this Petition. The initial opinion of the Court of Appeals, rendered on March 26, 1979, is also reproduced in full in Appendix A.

JURISDICTION

The Court of Appeals entered its initial opinion and judgment affirming the petitioners' conviction on March 26, 1979. Upon petition for rehearing, the Court of Appeals vacated the March 26th judgment and opinion, and rendered a final judgment affirming the petitioners' conviction on April 23, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, consistent with due process, a defendant in a criminal trial, who objected to the prejudicial admission of his brother's *nolo contendere* plea involving a completely unconnected criminal transaction, can be precluded on appeal from attacking that error because he sought at trial to minimize its harmful effects after his objection had been overruled.
2. Whether a trial judge, by excessive interference in the examination of witnesses, by repeated rebukes and disparaging remarks directed at defense counsel, and by marked impatience, all in the presence of the jury, displays such a partisan attitude that denial of a fair trial and deprivation of due process result?

CONSTITUTIONAL PROVISIONS

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. *United States Code*, Volume One, p. L (1976).

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *United States Code*, Volume One, p. L (1976).

STATEMENT OF THE CASE

Petitioners, who were employees of a Lumber Company which had contracted to purchase timber from the U.S. Forest Service, were indicted for alleged violations of 18 U.S.C. §641 — in effect, for embezzling timber. The charge was not based upon identified logs claimed to have been stolen, but rather upon a mathematical discrepancy between the Forest Service's estimate of the amount of timber covered by the sale and its measure of the timber actually cut and hauled. The government's theory was that petitioners had somehow penetrated the secret scale-load designation system and had manipulated it to reduce the Forest Service's sample-measured estimate of timber cut and hauled. Three hundred, forty-two thousand (342,000) board feet were measured as having been hauled by the Lumber Company. The Forest Service had measured 387,000 board feet remaining on site. The sum of these two figures left 271,000 board feet of timber unaccounted for based upon the "initial estimate" of 1,000,000 board feet for sale. It was for the theft of this estimated lumber that defendants were charged.

On December 31, 1973 Leavitt Lumber Company and the Forest Service entered into a standard form Timber Sale Contract whereby the Leavitt Lumber Company purchased what was known as the "Shingle Mill Hollow" timber tract. The sale was an individual tree designated sale, consisting mainly of 1740 diseased, dead, and over-mature trees. Leavitt Lumber Company commenced logging operations in June of 1976.

To facilitate advertisement of the sale and acceptance of bids, the Forest Service calculated the total number of board feet to be sold. The complex system of calculation included random selection, measurement, estimation, and mathematical computation of the board feet of a portion of the trees to be sold. A projection of the total board feet for the entire sale was then made. The "initial estimate" for the Shingle Mill Hollow sale was calculated to be 1,000,000 board feet, but the Forest Service recognized a potential sampling error of 4.4% and a defect factor of 16% for potentially blighted, diseased, or rotted timber.

The Forest Service also developed the "random truck load scale system" to more accurately measure the amount of timber cut and hauled by the purchaser. Under the "scaling" system the Forest Service secretly selected 20 of 100 truck loads of cut timber to be accurately "scaled"—that is, the total, *actual* board feet of these select truck loads would be measured. The amount showing on the scaler's report would be multiplied by five and computed on a monthly billing report which showed the calculated amount of timber that had been cut and removed and the value of that volume.

Mr. Larry Taylor, a Forest Service employee involved in the transaction with Leavitt Lumber, examined the scale load reports of early truck loads and became concerned that a particular scale load seemed to be abnormally low. He then requested that an investigation be commenced to examine the operation. The investigation revealed the alleged mathematical discrepancies referred to above.

Trial commenced on December 8, 1977, and on December 13, the jury returned a verdict of guilty as to each petitioner, on all counts. Sentence was imposed on January 25, 1978; judgment thereon was entered January 30, 1978. The Court of Appeals for the Tenth Circuit affirmed the conviction on March 26, 1979. Upon petition for rehearing, the Court vacated its judgment and opinion of March 26, and entered a final opinion and judgment affirming the conviction on April 23, 1979. For review of this judgment, petitioners pray a Writ of Certiorari issue to the Court of Appeals for the Tenth Circuit.

REASONS FOR GRANTING THE WRIT

1. *The rule announced by the Court of Appeals that a criminal defendant is precluded on appeal from assigning as error the admission of evidence to which he has made timely objection at trial but the harmful effects of which he has also sought to minimize after his objection has been overruled, is a violation of defendants' Fifth Amendment due process rights.*

During the trial of this case the prosecution sought to have hearsay evidence admitted concerning the *nolo contendere* plea of Lynn Leavitt, a brother of two of the petitioners. The brother was *not* a defendant in this action, and the *nolo contendere* plea was entered in a criminal case involving a transaction *completely unconnected* with the case at bar. More significantly, the plea was admitted only for the purpose of impeaching the testimony of Dale Leavitt, another nondefendant.

Defense counsel strenuously objected to the admission of such evidence, but the objections were entirely overruled. Thereafter, defense counsel had no choice but to call Lynn Leavitt, the brother of the petitioners, as a witness and introduce testimony concerning the facts surrounding his plea, and his motives for not contesting the charge.

On appeal, defendants again raised their objections to the admission of the *nolo contendere* testimony. But the Court of Appeals held, in their initial opinion, that because counsel had attempted to *minimize* the effects of the objectionable evidence during the trial, counsel on appeal was in an "unfavorable position to try now to *maximize* it." *United States v. Leavitt*, No. 78-1164 (10th Cir. filed March 26, 1979, vacated April 23, 1979), at p. 14. (Emphasis added.)

On rehearing the Court deleted the above-quoted sentence but nonetheless stated the following concerning counsel's attempts at trial to minimize the effects of the evidence:

> However, the defense was not satisfied to reserve the error.... Undoubtedly, the defense counsel tried to explain this nolo contendere transaction. This effort had at least some tendency to give the nolo plea added emphasis, although admittedly the evidence at the same time suggested that it lacked cogency. *United*

States v. Leavitt, No. 78-1164 (10th Cir. filed April 23, 1979) at pp. 13-14.

The implication conveyed in the second opinion is merely a more subtle restatement of the Court's brash ruling in the first.

Under the ruling of the Court of Appeals, when a defendant is confronted with the admission, over his objection, of what he thinks is clearly inadmissable evidence, he must sit by and refrain from introducing any evidence to combat the effect which the objectionable evidence may have had upon the jury. The Court's opinion now mandates that a criminal defendant, if he has previously objected to the prosecution's evidence, must waive his right to rebut, emasculate, or explain the admitted evidence. If he does not do so, but proceeds instead to counter the evidence, he forfeits his right to claim error on appeal.

Defendants have a fundamental right to a fair trial. *Drope v. Missouri* 420 U.S. 162, 172, (1975); *Estelle v. Williams* 425 U.S. 501, 503 (1976). The Sixth Amendment also secures to defendants a "package" of rights, which together operate, in the words of Mr. Justice Harlan in *California v. Green* 339 U.S. 149 (1970), "to constitutionalize the right to a defense as we now know it. . . ." *Id.*, at 176; see also *Webb v. Texas* 409 U.S. 95, 98 (1971) and *Faretta v. California* 442 U.S. 806, 818 (1975).

Mr. Justice Stewart, in *Faretta*, *supra*, enumerated the package of rights inherent in a defendant's constitutional right to present his defense:

> The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses *and the orderly introduction of evidence*. In short, the Amendment [Sixth] constitutionalizes the right in an adversary criminal trial to make a defense as we know it. *Id.*, at 818. (Emphasis added.)

That a defendant in a criminal trial has a due process right to proceed with "the orderly *introduction* of evidence" is clear from *Faretta*.

By prohibiting the petitioners on appeal from raising a proper and timely objection made during trial where evidence was introduced to minimize the effects of the overruled objection, the Court of Appeals penalized the petitioners for exercising their constitutional right to present a defense through the introduction of evidence. The petitioners cannot, consistent with due process, be penalized for the exercise of a constitutional right. *Griffin v. California* 380 U.S. 609, 614 (1965); *Brooks v. Tennessee* 406 U.S. 605, 610, 611 (1972); and *Lefkowitz v. Cunningham* 431 U.S. 801, 806 (1977).

The rule announced by the Court of Appeals violates the petitioners due process rights in yet another way.

The constitutional right to present a defense guarantees more than merely the presentation of a meaningless or sham defense. *Fay v. New York* 332 U.S. 261, 288 (1947). The defendant must be given a "*reasonable* opportunity to defend." *In re Oliver* 333 U.S. 257, 273, 275, (1948); he must be afforded a "*fair* opportunity to defend," *Chambers v. Mississippi* 410 U.S. 284, 294 (1973); and he must not be encumbered in presenting a "persuasive" defense. *Id.*, at 794.

As a necessary part of the constitutional right to present a defense and to *introduce* evidence, the due process clause of the Fifth Amendment also guarantees the petitioners the right to make a reasonable *objection* to the introduction of evidence.

A rule like that announced by the Court of Appeals compells a defendant to make a choice between two evils after his objection has been overruled. On the one hand the defendant could choose to minimize the effects of the evidence objected to by introducing other evidence tending to undermine the objectionable evidence, but if the defendant is convicted he is precluded from raising his initial admissibility objection on appeal. On the other hand the defendant could choose to merely reserve error after his objection is overruled with the hope that an appellate court would ultimately vindicate such objection, but by then any attempts the defendant might make at minimizing the impact of the objectionable evidence become obviously untimely. This Court has condemned such dilemmas or "Hobson's choices." *Simmons v. United States* 390 U.S. 377, 391 (1968).

Moreover, that the defense *should* have a constitutional right to reasonably object to the admission of evidence finds support in *Herring v. New York* 422 U.S. 853, 857 (1975):

> More specifically, the right to assistance of counsel has been understood to mean that *there can be no restrictions upon the function of counsel in defending a criminal prosecution* in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments. (Emphasis added.)

If a constitutional or due process right to object to the admission of evidence and to attempt to minimize its impact upon a jury is recognized by this Court, then the ruling of the Court of Appeals must be reversed because such a rule operates as a penalty for the exercise of that right.

In its ruling, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

2. *The trial judge's excessive interference in the examination of witnesses, repeated rebukes and disparaging remarks directed at petitioners' counsel, and his marked impatience, in the presence of the jury, combined to display such a partisan attitude that denial of a fair trial and deprivation of due process resulted.*

This Court has not outlined definitive due process standards for appellate courts to apply with respect to that misconduct by a trial judge in a criminal case which would effectively operate to deprive a defendant of his due process protections.

Because no such standards exist, the Courts of Appeals have applied inconsistent rules and have achieved inconsistent results. Compare *United States v. Leavitt, supra, United States v. Cardall*, 550 F.2d 604 (10th Cir. 1976), *United States v. Mackay*, 491 F.2d 616 (10th Cir. 1974), and *United States v. Porter*, 441 F.2d 1204 (8th Cir. 1971) with *United States v. Coke*, 339 F.2d 183 (2nd Cir. 1964), *Young v. United States*, 346 F.2d 793 (D.C. Cir. 1965), and *Killilea v. United States*, 287 F.2d 212 (1st Cir. 1961).

Respected authorities in the state courts have also applied apparently inconsistent standards. Compare *Warner v. State* 568 P.2d 128 (Okl. Cr. 1977), *cert. denied* 434 U.S. 999 (1978) and *Tanger v. Oklahoma City* 535 P.2d 698 (Okl. Cr. 1975) with *People v. De Jesus* 42 N.Y.2d 519, 399 N.Y.Supp.2d 196, 369 N.E.2d 752 (1977).

In considering whether Judge Ritter's sarcasm and conduct created an atmosphere inimical to a fair trial for the defendants, the Court of Appeals acknowledged that Judge Ritter "did manifest some lack of patience", and that the Judge's "conduct was not a model of judiciousness". In both its first and second opinions, the Court of Appeals conceded that Judge Ritter's conduct was improper but dismissed the inpropriety by alluding to misconduct on the part of the counsel for the defendants.

Some 22 pages of petitioners' brief to the Court of Appeals were dedicated to citing specific instances from the record where Judge Ritter's conduct was improper. (Appendix B.) In addition, petitioners compiled a table showing that Judge Ritter overruled 47 objections of the defendants, sustained 70 objections of the prosecution, interjected his own objections to defendants' procedure 17 times while sustaining only 2 objections of defendants and overruling 1 objection of the prosecution.

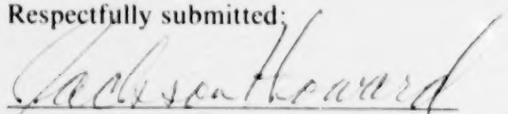
The overall conduct of Judge Ritter was so totally prejudicial and generated an atmosphere so inimicable to a fair trial of petitioners that such conduct should not have been lightly passed over as was done by the Court of Appeals, for Judge Ritter's comments "burdened the defendants with the obligations, not only of rebutting the proof of the people, but also of countering the implications imputed by the Court", and "under such circumstances the error cannot be disregarded as harmless." *People v. Jesus*, 399 N.Y.Supp.2d 196, at 199.

The Tenth Circuit has become understandably desensitized to error committed by Judge Ritter, and the standard applied by that Circuit in assessing judicial misconduct is demonstrably stricter than that applied in the First, Second and D.C. Circuits. Because the question herein presented and the guidelines herein requested involve such significant constitutional due process considerations, it is respectfully requested that this Court grant certiorari.

CONCLUSION

For the above reasons petitioners respectfully request this Court to grant certiorari. Once the petition has been granted, petitioners request that the judgment of the Court of Appeals be reversed based upon this Court's decisions in *Faretta v. California*, *supra*, and *Herring v. New York*, *supra*; and request that this case be remanded for redetermination of the issues raised herein. Petitioners request further in the alternative that a new trial be granted because of the misconduct of the trial judge.

Respectfully submitted;



JACKSON HOWARD, and
ROBERT C. FILLERUP for:
HOWARD, LEWIS, & PETERSEN
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 78-1164, 78-1165 and 78-1166

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STAN LEAVITT, GLEN LEAVITT, and LEE JOHNSON, Defendants-Appelants.	Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. CR-76-121)

Max D. Wheeler, Assistant United States Attorney (Ronald L. Rencher, United States Attorney, on the brief), for Plaintiff-Appellee.

Jackson Howard of Howard, Lewis & Petersen, Provo, Utah (Robert C. Fillerup of Howard, Lewis & Petersen, on the brief), for Defendants-Appellants.

Before McWILLIAMS, DOYLE and McKAY, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from judgments based on jury verdicts convicting Stan Leavitt, Glen Leavitt and Lee Johnson of theft from the government. The counts are the same in form. Each

alleges that on the day in question, three defendants did willfully and knowingly embezzle, steal and purloin saw logs having a value in excess of $100.00 and being the property of the United States, having been cut from the Uinta National Forest, Wasatch County, Utah, contrary to 18 U.S.C. § 641 and 18 U.S.C. § 2. The date of each count is different. Count I charged that the offense took place on July 20, 1976; Count II, July 21, 1976; Count III, July 22, 1976; Count IV, July 23, 1976; Count V, July 27, 1976; and Count VI, July 28, 1976

Reversal is sought on the ground that, first, it was legally impossible for the defendants to commit the crimes because the legal relationship created the impossibility.

Secondly, it is contended that the trial court erred in admitting certain evidence.

Third, it is argued that the trial judge was incompetent and incapable of giving the defendants a fair trial because the judge was biased and prejudiced against defendants and their counsel.

The three defendants were employees of Leavitt Lumber Company of Kamas, Utah, a small community located in the Wasatch Mountains some 35 miles east of Salt Lake City, Utah. It is a relatively small business having 30 to 45 persons. Its principal activity is the harvesting and processing of timber purchased from the United States Forest Service.

The predecessor of Leavitt was Greys River Lumber Company which was commenced by Dale Leavitt, the father of Stan and Glen Leavitt. His sons, Lynn and Kent, operated a mill in Alpine, Wyoming, and called it Greys River Logging Company, whereas Stan and Glen operated the mill at Kamas, calling it Leavitt Lumber Company. Dale Leavitt is vice-president of the Kamas mill. Lee Johnson, who is a truck driver, is an employee of the Kamas mill.

The pertinent statute is 18 U.S.C. § 641, which provides as follows:

> *Public money, property or records.* Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, ... any record, voucher, money or thing of value of the United States or of any department or agency thereof, ... [s]hall be fined not more than $10,000 or imprisoned not more that ten years, or both; but if the value of such property does not exceed the sum of $100.00, he shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

18 U.S.C. § 641

> *Principals.* (a) whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2.

The trial commenced December 8, 1977. On December 13, the jury returned verdicts of guilty. Sentencing was completed January 25, 1978, at which time the sentencing was carried out by Judge Winner.

The contract dated December 31, 1973, between the government and Leavitt Lumber Company describes the relationship and gives direction to the legal conclusions. It is a Standard form Timber Sale Contract. It provides for the purchase of so-called "Shingle Mill" or "Shingle Mill Hollow" timber by the company from the government.

The Forest Service had designated and marked the trees for the sale. A total of 1740 trees were selected for harvesting. These included the diseased, dead and over-mature ones. To advertise, the Forest Service calculated the number of board feet to be sold, or an "initial estimate" of the volume of board feet.

The initial estimate made by the Forest Service involved a random selection for measurement of a group of trees. Measurement was taken around the base of those selected and a calculation was made of the estimated height of the tree. From that, there was an estimator who determined the probable gross board feet of each tree. A defect factor was deducted in order to take disease into account. This defect factor was derived from published tables in the National Forest Service Scaler's Handbook.

After the computations, the Forest Service arrived at an initial estimate of 1,000,000 board feet or 1,000 M.B.F., which means thousand board feet. Following the advertisement for bids, a contract was awarded to the highest bidder, Leavitt Lumber Company.

Leavitt Lumber Company commenced logging operations in June 1976. The cutters would fell the trees and then would cut them into 33 foot lengths. The "skidders" would skid or drag the timber from the place where it was cut to the "landings" where it was stacked and made ready to load in the trucks. A mechanical loader picked the logs up and placed them on the individual trucks. Glen Leavitt did the loading on the Shingle Mill sale. In addition, there were two truck drivers, Lee Johnson, who hauled the loads of logs to the mill site at Kamas, and another. Stan Leavitt, the president of Leavitt Lumber, was in charge of the operation at Kamas.

The Forest Service devised a "scaling" system to attempt to achieve a more accurate measure of the amount of timber being hauled by the purchaser. The system was called a "random truck load scale system," the operation of which is here described:

The Forest Service made out a series of tickets numbered 2300 through 2399 for the first segment of the sale. Each ticket was divided into three parts, with the top and the second part being identical. At the bottom of each ticket was a small stub which was detachable from the two identical tickets. Using a random number table, the Forest Service selected 20 out of the 100 numbers to be scaled by the Forest Service. The bottom stub of each ticket was either marked as a scale or a non-scale load based on the random number table. The bottom half was then torn off and deposited in a small envelope marked with the corresponding load number. Load 2311 was a scale load and so the bottom part of the three part ticket for load 2311 was circled as a scale load. The small stub was then torn off and deposited in an envelop and marked 2311. The hundred envelopes had a hole punched in the top and were assembled on a wire loop which was then bolted and padlocked in a ticket box. The ticket box was then fastened to the outside of a building at the mill in Kamas. The purchaser was not made aware of which loads were to be scaled.

As each truck was loaded, the loader marked on the duplicate ticket, corresponding to that number, a count of logs loaded, the driver of the truck, and so on. One duplicate ticket was then detached and given to the driver of that load. In addition, the loader was to climb on the load of logs and paint the corresponding load number in two places, that being the upper and lower front left-hand corners of the load. Thereafter, the loader hauled the logs to the mill site. Upon arriving there, he went to the ticket box, pulled the envelope with the corresponding number, ripped the envelope open and examined the stub inside. If the load was non-scale, the driver could dump the load in the purchaser's log yard. If the load was marked "scale," the driver was to dump the load in an area where the Forest Service had asked the purchaser to stack those particular loads of logs.

In June 1976, the logging operations were started. In the first 90 loads there were 19 scale loads. As the loads were hauled to the mill site in Kamas, they were dumped in the corresponding areas and the scale loads were scaled at approximately two week intervals by a Forest Service scaler. The amount showing on the scaler's report was multiplied by five and computed on a monthly billing report which showed the calculated amount of timber that had been cut and removed and the value of that volume.

The Forest Service employee who made the calculations to determine the initial volume and who set up the sale, examined the scale loads and became concerned because one of them had only 800 net board feet. Based on his determination that the scale loads were lower than he anticipated, he requested an investigation to examine the operations.

The government's evidence showed that certain loads of logs were either scale loads which had been intentionally reduced in volume or load hauled with the same load number. The government maintained that Leavitt Lumber had accounted for 342,00 board feet as having been hauled, whereas the Forest Service measured 387,000 board feet remaining after Leavitt Lumber was removed from the sale, showing that the defendants had converted 271,000 board feet of timber worth approximately $29,000. The government never identified any specific logs which it claimed were stolen. It was content to establish by mathematics

the failure to establish that logs delivered equaled the number which the Leavitts received.

Defendants maintain that there were mathematical errors in the Forest Service's method of calculation and this was due in part to the fact that there was a variety in the types of scale loads. The government throughout the transaction maintained close scrutiny and documented duplicate and short loads carefully so there was strong corroboration of theft.

The points advanced by the defendants are:

First, that the defendants cannot be guilty of violating the theft statute as a matter of law. One big reason which they pressed was that Leavitt Lumber had both title and possession of saw logs at the time of the alleged crime.

Second, that the trial court erred in allowing the government to bring out testimony that Lynn Leavitt, a son who was a non-party, had pled nolo contendere to the charge of theft of two government logs at the Leavitt Wyoming site.

Third, that the court erred in allowing an expert witness to testify regarding certain envelopes which had not been put into evidence prior to his testimony.

Fourth, that the trial court had shown bias and prejudice against the defendants and their counsel as a result of which they were denied a fair trial.

I.

The issue of legal impossibility.

The alleged impossibility is founded on the legal concept or theory that the government did not have ownership of the logs at the time of the alleged theft. The argument is that title passed to the Leavitt Lumber Company, whereby it became the owner of the logs taken from the designated areas; since the logs did not belong to the government, there could not be a theft.

We must first examine the relevant part of the contract which states:

> All right, title, and interest in and to any Included Timber shall remain in Forest Service until it has been cut, Scaled, removed from Sale Area or other designated cutting area and paid for, at which time title shall vest in purchaser. For purposes of this Subsection, timber cut under cash deposit, Effective Purchaser Credit or payment guarantee under B4.3 [surety bond provision] shall be considered to have been paid for.

The defendants say that the surety bonds or bond payment of $30,000 together with a performance bond of $5,000 had the effect of bringing about payment and transfer of title.

This issue of ownership was presented to the trial judge who ruled that the defendants could contest the government's claim of ownership as part of their defense, and the court instructed the jury that the government had to prove that the stolen property was that of the United States.

Where, for example, a duplicate load was moved and was not reported, there would not be timber cut "under a bond." This would never be included on any billing and these loads would then *never* be paid for. Hence the title could not possibly be in law or fact transferred from the government. Furthermore, the contract above quoted provides that title does not pass in any event until the log is removed form the scale area. When there was a duplicate load, the theft occurred before removal from the sale area, and there was no way that the title could pass. The same would be true of intentionally shorting a scale load. The amount shorted would never be paid for either. Hence the transfer of title theory fails. Ownership remained in the government.

The next legal theory raised is that the government gave consent to the defendants to remove the property, and as a result there was no trespass and hence no theft. Defendants say that only if they were shown to have removed trees from the forest other than those marked by the Forest Service could they be held for theft. The government responds that the consent was limited to the taking of logs in accordance with the terms of the contract and not with the taking of them with intent to embezzle or purloin.

In the decision of this court in Loney v. United States, 151 F.2d 1 (10th Cir. 1945), which was decided in the context of a similar statute, 19 U.S.C. § 82, the distinction was made that there was no consent of the government for the defendant to take possession of property fraudulently obtained.

The Supreme Court in Morissette v. United States, 342 U.S. 246, 271 (1952), showed a disinclination to employ distinctions based on common law definition, whereby loopholes or gaps would be created in the statutes. Here the indictment charged embezzlement, stealing and purloining. In *Morissette*, the term "stealing" was broadly defined and it is not limited to the common law definition. It does speak of conversion and says that it may be consummated without any intent to keep and without a wrongful taking, but to steal is said to include taking of property by larceny, embezzlement or false pretenses. United States v. Turly, 352 U.S. 407 (1957).

Therefore, the fact that there was a consent to allow property to be in the possession of the defendants does not carry with it consent by the government for the defendants to steal, convert or even purloin it.

We do not read our decision in United States v. Speir, 564 F. 2d 934, 937-38 (10th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978), as showing any tendency to adopt strict common law definitions. That case merely holds that intent continues to be an element for conviction under 18 U.S.C. § 641. This is also true of *Morissette*. *Speir, supra*, upheld the conviction of stealing government property (Christmas trees from the national forest). The fact that the defendant knew that the property did not belong to him adequately proved the requisite intent.

The opinions of other circuits are not inconsistent with the view which we here adopt. *See* United States v. Cedar, 437 F. 2d 1033 (9th Cir. 1971); Magnolia Motor Logging Co. v. United States, 264 F 2d. 950 (9th Cir. 1959), *cert. denied*, 361 U.S. 815 (1959). Both of these were prosecutions under § 641, *supra*.

We conclude that contractual consent by the government has no tendency whatever to waive defendants' liability for theft.

The futher related contention of the defendants that the government does not have a criminal case and is limited to the actions for breach of contract lacks merit. They rely on United States v. Johnston, 268 U.S. 220 (1925), wherein the Supreme Court held that the defendant could not be convicted of embezzlement of United States money. This case arose under the Federal Revenue Act. Defendant owed excise tax and was a debtor not a

bailee. The tax was collected on admissions to boxing exhibitions. It was said that since the money did not belong to the United States at the time of the collection under the statute, and since the United States merely had a claim for the debt, it could not be an embezzlement. A conviction under the Revenue Act for willful failure to pay the tax was upheld.

Johnston is not governed by the conclusion that a debtor relationship existed. The decision was because the tax money had not been identified as United States property. This is clarified in a Ninth Circuit interpretation of the *Johnston* decision in United States v. Dupee, 569 F.2d 1061 (9th Cir. 1978). There the defendant sold postal money orders and failed to turn the money collected into the postal service. Dupee contended that he was not guilty of embezzlement; that he was simply a debtor. The Ninth Circuit rejected this by reasoning that the money collected became the property of the United States the moment that there was a collection.

Our situation is not dissimilar from that in *Dupee*. Here the defendents were charged with taking logs, not money. It is even more clear here that the logs belonged to the United States.

We have also considered the argument that there was a failure to prove that the value of the logs exceeded $100.00. We must reject this.

II.

Did the the trial court err in allowing the prosecutor to cross-examine Dale Leavitt about the entry by one of his sons, Lynn Leavitt, of a nolo contendere plea to the charge of stealing two logs in Wyoming?

The prosecutor took this up outside the presence of the jury before he did it. Objection was made by the defendants that it violated Rule 609 of the Federal Rules of Evidence and that the prejudice far exceeded the probative value. The court ruled that the plea was admissible for purposes of impeachment. On appeal, it is contended that the use of this evidence also violated Rule 410 of the Federal Rules of Evidence and Rule 11 (e) (6) of the Federal Rules of Criminal Procedure.

The court's decision to accept this evidence for the purpose of testing the credibility of the witness Dale Leavitt appears to

have been unjustifiable. The credibility of Lynn Leavitt was not in issue. Dale Leavitt was the witness and the nolo contendere plea by his son Lynn falls short of discrediting Dale as a witness.

As we view the surrounding facts, the defense contended that shortages which the government was relying on to establish the conversions were the products of miscalculations by the government which were always on the high side. The United States Attorney was seeking to establish, on the other hand, that the shortages could in general result from embezzlement or theft of the logs, and this particular transaction in Wyoming by Lynn Leavitt was offered presumably for the purpose of dramatizing this aspect.

Our view is that it was irrelevant to anything that was going on at the trial. It was not, however, a conviction or quasi conviction of Dale Leavitt who was the witness or of anybody who was on trial, and so the receipt of the evidence did not constitute severe prejudice. At the same time, the Untied States Attorney should have refrained from making such an offering merely because the trial judge would be inclined to accept it. The lesson is clear that only evidence which is relevant to the issues being tried can be offered and this is, to say the least, lacking in evidentiary value. It is remote and has only the slightest tendency to suggest theft in this instance. However, the defense was not satisfied to reserve the error. The defense called Lynn Leavitt as a witness for the purpose of testifying regarding this plea. He said:

> I took two logs out of some scale loads that was spread that I needed for a special order that I was sawing, and I planned on returning the two logs back in, the two that I took out, two more logs of the same size which I never did get a chance to do [because he was arrested first].

Undoubtedly the defense counsel elected to try to minimize this transaction, so he is in a somewhat unfavorable position to try now to maximize it.

Considering the strength of the evidence as a whole, and the lack of logical relationship to the transaction being tried, we are of the opinion that the quantity of prejudice does not justify reversal.

III.

Whether error resulted from the expert testimony of the witness James Gaskill that he examined the scale ticket envelopes and discovered that several had been torn open at the same time.

The testimony under attack was offered in support of the government's theory that the defendants knew the scale loads in advance of assembly and loading. The established procedure allowed only one envelope to be opened at any given time because the envelope was opened only after the truck arrived at the yard loaded with logs.

The objection to Gaskill's testimony was that there was not a proper foundation. The questions now argued with respect to laying a foundation prior to the expert testimony and the alleged failure to establish that there was a chain of evidence prior to the expert testimony do not impress us as being worthy of attention because this is the kind of a matter that is left to the trial court's discretion. *See* United States v. Carranco, 551 F.2d 1197, 1199-1200 (10th Cir. 1975), *cert. denied*, 429 U.S. 941 (1976).

The decision cited by defendants, United States v. Wagner, 475 F.2d 121 (10th Cir 1973), and United States v. Williams, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972), are not persuasive. The chain, it should be noted, was finally fully testified to.

IV.

Whether the trial court's sarcasm and conduct generally created an atmosphere that was inimical to a fair trial for the defendants.

No particular action on the part of Judge Ritter is pointed to. There are some quotations, but they are not individually, or as a whole, sufficient to support the argumentative conclusions that are offered. The judge did manifest some lack of patience and he at times advised defense counsel that his questions were not relevant or were cumulative and he should stop pursuing them. Also, counsel was told to limit his opening statement to remarks which are proper in such a statement. Defense counsel was not affected by the "suggestions" which the trial court gave. He appeared to continue in his own fashion. Judge Ritter's conduct

was not a model of judiciousness by any means, but, on the other hand, it was far less excessive than counsel would have us believe. The statements made were not substantial. To be sure, they produced discomfort. On the other hand, counsel's conduct was not entirely exemplary. Hence we must reject the plea that the cause has to be remanded for a new trial.

We affirm.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 78-1164, 78-1165 and 78-1166

OPINION ON REHEARING

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. CR-76-121)
v.	)	
STAN LEAVITT, GLEN LEAVITT, and LEE JOHNSON, Defendants-Appelants.	)	

Max D. Wheeler, Assistant United States Attorney (Ronald L. Rencher, United States Attorney, on the brief), for Plaintiff-Appellee.

Jackson Howard of Howard, Lewis & Petersen, Provo, Utah (Robert C. Fillerup of Howard, Lewis & Petersen, on the brief), for Defendants-Appellants.

Before McWILLIAMS, DOYLE and McKAY, Circuit Judges.

DOYLE, Circuit Judge.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc which was filed April 9, 1979.

Upon consideration whereof, it is ordered as follows:

1. The petition for rehearing is granted by Circuit Judges McWilliams, Doyle, and McKay, to whom the case was orally argued and submitted.

2. No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procecure, the suggestion for rehearing in banc is denied.

3. The opinion filed March 26, 1979, is hereby withdrawn.

4. The judgment entered by the Court on March 26, 1979, is hereby vacated.

5. The Court has determined that a final disposition of the cause can be made without reargument.

6. The Court's opinion on rehearing is ordered filed this day and shall constitute the final judgment of the Court in the captioned appeal.

Howard K. Phillips
Clerk

This is an appeal from judgments based on jury verdicts convicting Stan Leavitt, Glen Leavitt and Lee Johnson of theft from the government. The counts are the same in form. Each alleges that on the day in question, three defendants did willfully and knowingly embezzle, steal and purloin saw logs having a value in excess of $100.00 and being the property of the United States, having been cut from the Uinta National Forest, Wasatch County, Utah, contrary to 18 U.S.C. § 641 and 18 U.S.C. § 2. The date of each count is different. Count I charged that the offense took place on July 20, 1976; Count II, July 21, 1976; Count III, July 22, 1976; Count IV, July 23, 1976; Count V, July 27, 1976; and Count VI, July 28, 1976

Defendants-appellants seek reversal generally on four contentions which are delineated below. The emphasis is on what

might be described as the legal impossibility theory which is bottomed on the argument that the contract terms are such that the government agreed to have title passed to the Leavitts almost instantly at the scene of the timbering. From this it is contended that since the logs are no longer government property, there could be no conversion or intent to steal. The other alleged errors are trial ones which will be considered hereinafter.

Although there is some suggestion in the briefs that the evidence was insufficient, this is not particularly asserted.

Our conclusion is that the legal impossibility concept was not established by the contract, any implied agreement or the circumstances. Also, we conclude that the evidence is amply sufficient to support the charges. Evidence of two of the defendants' confessions or admissions were introduced in evidence, and although much of the evidence is circumstantial and depends upon the drawing of inferences, these circumstances are strong and sufficient. Also, there were observations by government agents which corroborated the Forest Service's theory of the case.

The three defendants were employees of Leavitt Lumber Company of Kamas, Utah. Kamas is located in the Wasatch Mountains, some 35 miles east of Salt Lake City, Utah. At the time of the offenses charged, the company's main activity was the harvesting and processing of timber which was purchased from the United States Forest Service.

The predecessor of Leavitt was Greys River Lumber Company which was commenced by Dale Leavitt, the father of Stan and Glen Leavitt. His sons, Lynn and Kent, operated a mill in Alpine, Wyoming, and called it Greys River Logging Company, whereas Stan and Glen operated the mill at Kamas, calling it Leavitt Lumber Company. Dale Leavitt is vice-president of the Kamas mill. Lee Johnson, who is a truck driver, is an employee of the Kamas mill.

The pertinent statute is 18 U.S.C. § 641, which provides as follows:

> *Public money, property or records.* Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, . . . any record, voucher,

> money or thing of value of the United States or of any department or agency thereof, ... [s]hall be fined not more than $10,000 or imprisoned not more that ten years, or both; but if the value of such property does not exceed the sum of $100.00, he shall be fined not more than $1,000.00 or imprisoned not more than one year, or both.

18 U.S.C. § 641

> *Principals.* (a) whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The trial commenced December 8, 1977 and ended December 13, with the return of guilty verdicts by the jury. Sentencing was completed on January 25, 1978. Judge Fred Winner pronounced the sentences.

The contract dated December 31, 1973, between the government and Leavitt Lumber Company described the relationship of the sale and gave direction to the legal conclusions. It was a standard form Timber Sale Contract. It provided for the purchase of so-called "Shingle Mill" or "Shingle Mill Hollow" timber by the company from the government.

The Forest Service had designated and marked the trees for the sale. A total of 1740 trees were selected for harvesting. These included the diseased, dead and over-mature ones. To advertise the sale, the Forest Service calculated the number of board feet to be sold, or an "initial estimate" of the volume of board feet.

The initial estimate made by the Forest Service involved a random selection for measurement of a group of trees. Measurement was taken around the base of those selected and a calculation was made of the estimated height of the tree. From that, there was an estimator who determined the probable gross board feet of each tree. A defect factor was deducted in order to take disease into account. This defect factor was derived from published tables in the National Forest Service Scaler's Handbook.

After the computations, the Forest Service arrived at an initial estimate of 1,000,000 board feet or 1,000 M.B.F, which means thousand board feet. Following the advertisement for bids, a contract was awarded to the highest bidder, Leavitt Lumber Company.

Leavitt Lumber Company commenced logging operations in June 1976. The cutters would fell the trees and then would cut them into 33 foot lengths. The "skidders" would skid or drag the timber from the place where it was cut to the "landings" where it was stacked and made ready to load in the trucks. A mechanical loader picked the logs up and placed them on the individual trucks. Glen Leavitt did the loading on the Shingle Mill sale. In addition, there were two truck drivers, Lee Johnson, and another person who hauled the loads of logs to the mill site at Kamas. Stan Leavitt, the president of Leavitt Lumber, was in charge of the operations at Kamas.

The Forest Service devised a "scaling" system to attempt to achieve a more accurate measure of the amount of timber being hauled by the purchaser. The system was called a "random truck load scale system," the operation of which is here described:

The Forest Service made out a series of tickets numbered 2300 through 2399 for the first segment of the sale. Each ticket was divided into three parts, with the top and the second part being identical. At the bottom of each ticket was a small stub which was detachable from the two identical tickets. Using a random number table, the Forest Service selected 20 out of the 100 numbers to be scaled by the Forest Service. The bottom stub of each ticket was either marked as a scale or a non-scale load based on the random number table. The bottom half was then torn off and deposited in a small envelope marked with the corresponding load number. Load 2314 was a scale load and so the bottom part of the three-part ticket for load 2314 was circled as a scale load. The small stub was then torn off and deposited in an envelope and marked 2314. The hundred envelopes had a hole punched in the top and were assembled on a wire loop which was then bolted and padlocked in a ticket box. The ticket box was then fastened to the outside of a building at the mill in Kamas. The purchaser was not made aware of which loads were to be scaled.

As each truck was loaded, the loader marked on the duplicate ticket, corresponding to the number, a count of logs loaded, the driver of the truck, and so on. One duplicate ticket was then detached and given to the driver of that load. In addition, the loader was to climb on the load of logs and paint the corresponding load number in two places, the upper and lower front left-hand corners of the load. Thereafter, the driver hauled the logs to the mill site. Upon arriving there, he went to the ticket box, pulled the envelope with the corresponding number, ripped the envelope open and examined the stub inside. If the load was non-scale, the driver could dump the load in the purchaser's log yard. If the load was marked "scale," the driver was to dump the load in an area where the Forest Service told the purchaser to stack the scale loads.

In June 1976, the logging operations were started. In the first 90 loads, there were 19 scale loads. As the loads were hauled to the mill site in Kamas, they were dumped in the corresponding areas, and the scale loads were scaled at approximately two-week intervals by a Forest Service scaler. The amount shown on the scaler's report was multiplied by five to calculate the amount of timber that had been cut and removed for the monthly billing report. The amount was then used to compute the value of the timber.

The Forest Service employee who made the calculations to determine the initial volume and who set up the sale, examined the scale loads and became concerned because one of them had only 800 net board feet. Based on his determination that the scale loads were lower than he anticipated, he requested an investigation to examine the operations.

The government's evidence showed that certain loads of logs were either scale loads which had been intentionally reduced in volume or loads hauled with the same load number. The government maintained that Leavitt Lumber had accounted for 342,000 board feet as having been hauled, whereas the Forest Service measured only 387,000 board feet remaining after this timber had been removed from the sale area. This suggested that the defendants had converted 271,000 board feet of timber worth approximately $29,000. Defendants maintained that there were mathematical errors in the Forest Service's method of calculation

and this was due in part to the fact that there was variety in the types of scale loads.

The government never identified any specific logs which it claimed were stolen, but the government witnesses, who conducted the surveillance, did identify specific load numbers as the duplicate or shorted loads. In addition, the government introduced photographs of some of the loads. The six counts in the indictment represented six specific loads that were duplicated or shorted on the specific dates indicated. The government throughout the transaction maintained close scrutiny and documented duplicate and short loads carefully. As a result, there was strong corroboration of theft in addition to any mathematics.

The points advanced by the defendants which we discuss are:

First, that there cannot be guilt of theft because under the terms of the contract, Leavitt Lumber had both title and possession of the saw logs at the time of the alleged crime. Since the government had divested itself of any property interest, there could not be a conversion of government property.

Second, that the trial court erred in allowing the government to bring out testimony that Lynn Leavitt, a son who was a non-party, had pled nolo contendere to the charge of theft of two government logs at the Leavitt site in Wyoming.

Third, that the court erred in allowing an expert witness to testify regarding certain envelopes which had not been put into evidence prior to his testimony.

Fourth, that the trial judge showed bias and prejudice against the defendants and their counsel so that a fair trial was denied.

I.
THE ISSUE OF LEGAL IMPOSSIBILITY

The alleged impossibility is founded on the legal concept or theory that the government did not have ownership of the logs at the time of the alleged theft. The argument is that title had passed to the Leavitt Lumber Company, whereby it became the owner of the logs taken from the designated areas. Since the logs did not belong to the government, there could not have been a theft.

We must first examine the relevant part of the contract which states:

> All right, title, and interest in and to any Included Timber shall remain in Forest Service until it has been cut, Scaled, removed from Sale Area or other designated cutting area and paid for, at which time title shall vest in purchaser. For purposes of this Subsection, timber cut under case deposit, Effective Purchaser Credit or payment guarantee under B4.3 [surety bond provision] shall be considered to have been paid for.

The defendants say that the surety bond of $30,000 together with a performance bond of $5,000 had the effect of bringing about payment and transfer of title.

This issue of ownership was presented to the trial judge who ruled that the defendants could contest the government's claim of ownership as part of their defense. The court instructed the jury that the government had to prove that the stolen property was that of the United States.

Where, for example, a duplicate load was removed and was not reported, there would not be timber cut "under a bond." Such a load would never be included on any billing and would then *never* be paid for. Hence the title could not possibly be in law or fact transferred from the government. Furthermore, the contract above quoted provided that title did not pass in any event until the log was removed from the sale area. When there was a duplicate load, the theft occurred before removal from the sale area, and there was no way that the title could have passed under the terms of the contract. The same would be true of intentionally shorting a scale load. The theft occurred before removal from the sale area, and the amount shorted would never be paid for. Hence the transfer of title theory fails. Ownership remained in the government.

The next legal theory raised is that the government gave consent to the defendants to remove the property. As a result, the argument is made that there was no trespass and consequently no theft. Defendants say that only if they were shown to have removed trees from the forest other than those marked by the Forest Service could they have been guilty of theft. The government's response is that the consent was limited to the taking of

logs in accordance with the terms of the contract, and that consent was not given to removal with an intent to steal or embezzle.

The decision of this court in Loney v. United States, 151 F.2d 1 (10th Cir. 1945), was reached in the context of a similar statute, 19 U.S.C. § 82. The distinction was made that there was not consent by the government where the defendant took possession of property which had been obtained by fraud.

The Supreme Court in Morissette v. United States, 342 U.S. 246, 271 (1952), expressed a disinclination to employ distinctions based on the common law definition of crimes, whereby loopholes or gaps would be created in the statues. Here the indictment charged embezzlement, stealing and purloining. In *Morissette*, the term "stealing" was broadly defined. It was not limited to the common law definition. The opinion did speak of conversion and stated that it (conversion) may be consummated without intent to keep and without a wrongful taking. 342 U.S. at 272. To steal has been said to include taking of property by larceny, embezzlement or false pretenses. Untied States v. Turley, 352 U.S. 407, 412 (1957).

Therefore, the fact that there was consent to allow property to be in the possession of the defendants for lawful purposes does not constitute consent by the government for the defendants to steal, convert or even purloin such property.

We do not read our decision in United States v. Speir, 564 F.2d 934, 937-38 (10th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978), as showing any tendency to adopt strict common law definitions. That case merely held that intent continued to be an element of conviction under 18 U.S.C. § 641. This was also true of *Morissette*. *Speir, supra*, upheld the conviction of stealing government property (Christmas trees from the national forest). The fact that the defendant in *Speir* knew that the property did not belong to him proved the requisite intent.

The opinions of another circuit are not inconsistent with the view which we here adopt. *See* United States v. Cedar, 437 F.2d 1033 (9th Cir. 1971); Magnolia Motor Logging Co. v. United States, 264 F.2d 950 (9th Cir. 1959), *cert. denied*,362 U.S. 815 (1959). Both of these were prosecutions under § 641, *supra*.

We conclude that contractual consent by the government for the defendant to possess the logs has no tendancy whatever to waive defendants' laibility for theft.

The related contention of the defendants that the government did not have a criminal case and was limited to an action for breach of contract lacks merit. They rely on United States v. Johnston, 168 U.S. 220 (1925), wherein the Supreme Court held that the defendant could not be convicted of embezzlement of United States money. This case arose under the Federal Revenue Act. Defendant owed excise tax and was a debtor rather than a bailee. The tax was collected on admissions to boxing exhibitions. It was said that since, under the statute, the money did not belong to the United States at the time of the collection, and since the United States merely had a claim for the debt, it could not be an embezzlement. A conviction under the Revenue Act for willful failure to pay the tax was upheld.

Johnston was not governed by the conclusion that a debtor relationship existed. The decision was because the tax money had not been identified as United States property. This was clarified in a Ninth Circuit interpretation of the *Johnston* decision in United States v. Dupee, 569 F.2d 1961 (9th Cir. 1978). There the defendant sold postal money orders and failed to turn the money collected into the postal service. The defendant contended that he was not guilty of embezzlement because he was simply a debtor. The Ninth Circuit rejected this. It reasoned that the money collected became the property of the United States at the moment of the collection.

Our situation is not dissimilar from that in *Dupee*. Here the defendants were charged with taking logs, not money. It is even more clear here that the logs belonged to the United States at the time of conversion.

We have also considered the argument that there was a failure to prove that the value of the logs exceeded $100.00. We reject this.

II.

DID THE TRIAL COURT ERR IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DALE LEAVITT ABOUT THE ENTRY BY ONE OF HIS SONS, LYNN LEAVITT, OF A NOLO CONTENDERE PLEA TO THE CHARGE OF STEALING TWO LOGS IN WYOMING?

The dispute as to admissibility was conducted outside the presence of the jury. Objection was made by the defendants that receipt or acceptance of the evidence would violate Rule 609 of the Federal Rules of Evidence and that the prejudice far exceeded the probative value. The court ruled that the plea was admissible for purposes of impeachment. On appeal, it is contended that the use of this evidence also violated Rule 410 of the Federal Rules of Evidence and Rule 11 (e) (6) of the Federal Rules of Criminal Procedure.

The court's decision to accept this evidence for the purpose of testing the credibility of the witness Dale Leavitt was not justifiable. The credibility of Lynn Leavitt was not in issue. Dale Leavitt was the witness and the nolo contendere plea by his son Lynn fell short of discrediting Dale as a witness.

Our view of the surrounding facts is that the defense contended that the shortages which the government relied on to establish the conversions were the products of miscalculations or high estimates by the government. The United States Attorney was seeking to establish, on the other hand, that the shortages could, in general, result from embezzlement or theft of the logs, and this particular transaction in Wyoming by Lynn Leavitt was offered presumably for the purpose of dramatizing this aspect.

We conclude that the use of the plea was irrelevant to anything that was going on at the trial. It was not, however, a conviction or quasi conviction of Dale Leavitt, who was the witness, or of anybody who was on trial, and so the receipt of the evidence did not constitute severe prejudice. At the same time, the United States Attorney should have refrained from making such an offering merely because the trial judge would be inclined to accept it. The lesson is clear that only evidence which was relevant to the issues being tried could be offered, and the subject

item was, to say the least, lacking in evidentiary value. The plea was remote and had only the slightest tendency to suggest theft in the case being tried. However, the defense was not satisfied to reserve the error. The defense called Lynn Leavitt as a witness for the purpose of testifying regarding this plea. He said:

> I took two logs out of some scale loads that was spread that I needed for a special order that I was sawing, and I planned on returning the two logs back in, the two that I took out, two more logs of the same size which I never did get a chance to do [because he was arrested first].

Undoubtedly, the defense counsel tried to explain this nolo contendere transaction. This effort had at least some tendency to give the nolo plea added emphasis, although admittedly the evidence at the same time suggested that it lacked cogency.

In sum, it is our conclusion that the plea as evidence did not reflect strongly on the defendants being tried in this case. In fact, as we view it, Lynn Leavitt's plea had little tendency to undermine the credibility of Dale Leavitt's testimony. Dale Leavitt was the witness from whom the answer was elicited. The strength, or lack of it, of this unfortunate testimony, which bears no logical relation to the transaction being tried, contributes to our conclusion that the quantum of prejudice fell far short of calling for reversal.

III.

WHETHER ERROR RESULTED FROM THE EXPERT TESTIMONY OF THE WITHNESS JAMES GASKILL THAT HE EXAMINED THE SCALE TICKET ENVELOPES AND DISCOVERED THAT SEVERAL HAD BEEN TORN OPEN AT THE SAME TIME

The testimony under attack was offered in support of the government's theory that the defendants knew the scale loads in advance of assembly and loading. The established prodecure allowed only one envelope to be opened at any given time because the envelope was opened only after the truck arrived at the yard loaded with logs.

The objection to Gaskill's testimony was that there was not a proper foundation. The questions which are now argued with respect to laying a foundation prior to the expert testimony and

the failure to establish a chain of evidence prior to the expert testimony, do not impress us as being worthy of attention because this is the kind of a matter that is left to the trial court's discretion. *See* United States v. Carranco, 551 F.2d 1197, 1199-1200 (10th Cir. 1977); United States v. Harris, 534 F.2d 207, 213 (10th Cir. 1975), *cert. denied*, 429 .S. 941 (1976). The decisions cited by defendants, United States v. Wagner, 475 F.2d 121 (10th Cir. 1973), and United States v. Williams, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972), are not persuasive. There was no denial of confrontation because all the government agents in the chain appeared as witnesses and were avaliable for cross-examination.

IV.

WHETHER THE TRIAL COURT'S SARCASM AND CONDUCT GENERALLY CREATED AN ATMOSPHERE THAT WAS INIMICAL TO A FAIR TRIAL FOR THE DEFENDANTS

The record does not disclose any particular actions on the part of Judge Ritter which of themselves carry a substantial impact. There are some quotations in the defendants' brief, but they are not individually, or as a whole, sufficient to support the argumentative conclusions that the defendants offered. The judge did manifest some lack of patience, and he at times advised defense counsel that his questions were not relevant or were cumulative and that counsel should stop pursuing them. Also, counsel was told to limit his opening statement to remarks which were proper in such a statement. Defense counsel was not affected by the "suggestions" which the trial court gave. He appeared to continue in his own fashion. Judge Ritter's conduct was not a model of judiciousness. We do not conclude, however, that it resulted in an atmosphere that created prejudice calling for reversal. There were a number of instances, on the other hand, during the trial in which defense counsel did not show acceptance of the rulings of the court in that he would just pursue the line of questioning that had already been objected to until the court gave its ruling extra emphasis.[1] Hence we must reject the plea that the cause has to be remanded for a new trial.

We affirm.

[1]Mr. Howard's own selections of incidents which are included in his brief, even though not in full context, themselves demonstrate the point which is here made.

APPENDIX B

Edited Text of Argument on Misconduct of Trial Judge Presented to Court of Appeals.

POINT IV

THE CONDUCT OF THE JUDGE DURING THE TRIAL EVIDENCED BIAS AND PREJUDICE AGAINST DEFENDANTS AND THEIR COUNSEL DENYING THEM A FAIR TRIAL.

Judge Ritter evidenced an obvious bias and prejudice against the defendants and demonstrated pre-disposition toward believing the defendants guilty as charged. The judge was extremely impatient and caustic with defense counsel and continually inferred that defense counsel was merely trying to delay the trial.

The colloquy between Court and counsel for the defendants could do nothing but poison the minds of the jury and deny the defendants a fair trial.

The Court should remember that this case had been called for December 5, 1977, and the defendants together with counsel and witnesses had appeared ready for trial in the courtroom in Salt Lake City on each day, December 5, 6 and 7 and although a jury was impaneled on December 6, 1977, it was not until 3:30 p.m. on December 8, 1977, that the Court commenced trial.

The improprieties of the trial judge were continuous and pervasive. The following represent only a few examples.

During the direct examination of the Government's first witness, Larry Taylor, the following exchange occurred:

* * *

> MR. HOWARD: The reason I object is you say "we found" and "we" seems plural.
>
> THE COURT: Well, now, we're taking a lot of time editorializing from counsel table. (T. 35-36).

Immediately after the attempted voir dire, the following took place:

> MR. HOWARD: Now, I'm going to object to any loads other than those which pertain to the six charges

made as being prejudicial and evidence designed only to inflame the jury.

THE COURT: Objection is overruled. Go ahead. Examine your witnesses. Let's get this evidence on. (T. 3.).

Upon cross examination of Mr. Taylor, Mr. Howard attempted to identify and offer as evidence the ticket box. The following exchange took place:

THE COURT: Well, you don't need to have the Clerk lock up the box and keep it in custody here as an Exhibit. You can make whatever claims about it you want to, but I don't see any relevancy in making that an Exibit in this case.

MR. HOWARD: I think it would be a good piece of evidence for the jury to inspect. Your Honor, and I'm hopeful that the jury will have an opportunity to do so.

MR. WHEELER: I have no objection. Rather than argue about it, Your Honor, I have no objection.

THE COURT: Well, anything to take up time, you know.

MR. HOWARD: Your Honor, I'm not trying to take up the time of this Court. I'm trying to defend these people the best I can. (T. 62).

During the same cross-examination of Mr. Taylor, the following took place:

Q Oh, you worked it out by hand. Well, if I make that extension doing it that way, I come up with one million one hundred twenty-two thousand three hundred.

MR. WHEELER: Your Honor, I'm going to object to Mr. Jackson[1] making figures himself. It's not proper for him to testify to what he's done. Now, if he wants the witness to do it or if he wants to put a summary on—

THE COURT: The objection is sustained and we've gone as far as I'm going to permit you to go with this.

MR. HOWARD: Your Honor, I'm just talking about the mathematics.

Q (By Mr. Howard) If we take that figure, that seventeen forty, and I'm willing to give you my calculator—

THE COURT: Well, we're through with your calculator.

MR. HOWARD: Your Honor, it's a very valuable bit of testimony. I want to show that he's made over a ten percent error.

THE COURT: Well, that's your testimony.

MR. HOWARD: Your Honor, I don't mean to testify. I want the witness to tell me if that is true.

THE COURT: Well, I'm not going to argue with you, Mr. Howard. The objection is sustained and that's it.

MR. WHEELER: Your Honor, I have no objection if Mr. Howard wants to ask the witness to recompute his figures to see if there's an error, but for him to make the calculation—

THE COURT: Well, he doesn't want to do that. He wants to do it himself. (T. 93-94).

Later Mr. Howard attempted to analyze with the government's witness the nineteen scale loads in question:

A The next one was load 35 and it had a scale of four thousand four hundred seventy.

Q What was the next one?

THE COURT: Well, we're not going through seventy-five loads.

MR. HOWARD: Well, Your Honor, there were only nineteen as I recall.

THE COURT: Well, we're not going through any more. (T. 119-120).

* * *

Q (By Mr. Howard) In any event, you have no photograph or no recollection of ever seeing a truck marked 2362?

MR. WHEELER: Your Honor, that's repetitive. I think he's answered it three times.

THE COURT: Yes, he has. That's enough of that. (T. 205).

* * *

Q So there's a very small percentage of defect in that load, isn't that true?

A That's not very small.

[1]Mr. Wheeler and the Court frequently, during the trial, referred to Mr. Howard as Mr. Jackson.

Q You don't think that's very small, six hundred feet?

THE COURT: Well, now you're arguing.

MR. HOWARD: All right, Your Honor, I don't mean to argue with the witness.

THE COURT: Sometime we must bring these things to a conclusion.

Q (By Mr. Howard) Let me ask you about ticket number 2373.

* * *

Q There was only one hundred sixty feet of defect in that load.

A Okay.

MR. WHEELER: Now, this is argument. It's not asking questions.

THE COURT: It certainly is argumentative, and I'm not going to permit you to pursue that any further. You might just as well bring it to an end now. If there's anything else you want to go into on cross-examination of this witness, move on to it.

MR. HOWARD: Your Honor, I'm merely trying to compare—

THE COURT: I'm not going to discuss it with you.

MR. HOWARD: All right, Your Honor. (T. 209–210).

During defense counsel's opening statement, Mr. Howard was limited in what he could say by the Court on at least three occasions.

> "We'll also show you that sometime ago Dale Leavitt, the father, had a heart attack and so he's semi-retired from the business. He relinquished his position as president and turned it over to the oldest son Stan who is president of the company. We will bring evidence to show you that these people are people of good repute, character and honesty. Mr. Dale Leavitt is County Commissioner in Summit County, elected by the people. Mr. Stanley Leavitt—and, by the way, he served on the Town Board of Kamas. Mr. Stanley Leavitt is financial clerk in his Ward, has been for years.
>
> MR. WHEELER: Your Honor, I'm going to object to the interjection of all of these immaterial facts. It's immaterial that these people are Ward Clerks or County Commissioners or whatever else.

THE COURT: There isn't any question about it, and you will desist from any further conversation on those subjects.

MR. HOWARD: Your Honor, may the record show that I'm just trying to make a record that show credibility. I'll abide by the Court's ruling.

THE COURT: Well, are you testifying as to their character?

MR. HOWARD: No, sir. I meant to call witnesses. I indicated we would have character witnesses.

THE COURT: Well, you just call your witnesses and let the witnesses produce the evidence. To talk about all these things in front of the jury is improper and I don't want you to do it any further.

MR. HOWARD: All right, Your Honor.

From time to time I over-step, I apologize to the jury and to the court. Counsel attempts to represent his clients as best he can, and I have no desire to misstate any facts or stray beyond the limits of propriety.

THE COURT: Well, why don't you make an opening statement.

MR. HOWARD: I'm doing that, Your Honor. (T. 290–292)

* * *

THE COURT: Well, now, you're making a speech. You know that opening statement is confined to you telling what the witnesses are going to testify to.

MR. HOWARD: I'm aware of that, Your Honor.

THE COURT: Now, it sounds to me like you're doing about three-fourths editorializing and a very small part about what the witnesses are going to tell us. Now, just cut out the argument and tell us what the witnesses are going to testify to and put the witnesses on and let's conduct this trial the way we conduct trials in this court.

HR. HOWARD: I'll follow the court's admonition, Your Honor.

I was telling what Mr. Leavitt, Glen Leavitt, will tell you and why he loaded trucks in this particular fashion.

I'll have Mr. Art Lynn testify concerning loads on those trucks, and he will tell you that you can't tell by looking at a truck what—this type truck—what the weight is or what the board feet is except in very big generalities.

I have a man coming down from Seattle, Washington, one of the great scalers in the United States, a master scaler—

MR. WHEELER: Your Honor, that is improper to characterize this witness.

THE COURT: That certainly is more of the same. Your opening statement has come to a conclusion. Put on your witnesses. (T. 298–299).

At this point, Mr. Howard withdrew from the podium in front of the jury and returned to counsel table. Before sitting down, however, the following colloquy took place between him and the Court:

MR. HOWARD: Your Honor, may I make a record at this point that I don't—I want to abide by the court's ruling and I will, but I merely want to note for the record that I object to the court's ruling that denies me the opportunity of making an opening statement.

THE COURT: Well, if you will tell us what the witnesses are going to testify to and make a proper opening statement, you may proceed. But even after I tell you what I want you to do and tell you what you're doing is improper, you will pursue the same route. Now, I don't want to stop you from making an opening statement. I want you to make your opening statement, but it ought to be an opening statement. Now, if you want to proceed, and tell us what the witnesses are going to testify to, all right, but we don't need any character testimony from you about this greatest scaler in the United States. That's just an illustration.

MR. HOWARD: I merely was speaking of his credentials, Your Honor, and perhaps I used a bad choice of words.

THE COURT: Well, never mind. I don't want to hear any argument on it either. Proceed with your opening statement in the way that I've suggested.

MR. HOWARD: Thank you, Your Honor. (T. 299–300).

Additional examples of the Court's impatience:

Mr. Bailiff, will you ask Mr. Dale Leavitt to come in.

THE COURT: You have somebody at your table to take care of that. My bailiff is not an errand boy. Have those witnesses ready to come in here so we don't lose any time. (T. 303–304).

* * *

THE COURT: Call your next witness.

MR. HOWARD: Mr. Leavitt, will you have Mr. Mair come in.

THE COURT: Now, have these ready so we don't lose any time.

MR. HOWARD: I have them ready, Your Honor. (T. 472).

* * *

Q Now, can the cruiser—tell the jury what a cruiser is?

A Well, he's a man that goes in and looks the forest over, looks the patch of timber over and cruises it. When I say cruise, he decides what's there, maybe volumes, how much timber is there and what the species are.

THE COURT: Well, my goodness. We don't need to have a recitation on this. We are limited in our time here. Now, I hope you're going to recognize that.

MR. HOWARD: I am, Your Honor.

THE COURT: Well, let's do that then. There's no need of this man making a speech about what a cruiser is. (T. 312).

The Court, after 2 days of trial did not realize that Stan Leavitt was one of the defendants:

Q Now are there reasons why you would not want to have an overload of lumber?

A Well, it's hard—

THE COURT: Now, how many witnesses are going to have to testify to that now? The father just got through testifying to the three reasons.

MR. HOWARD: Well, I had in mind every witness that I call would testify to that fact because I want the jury to know that—

THE COURT: Well, I'm not going to permit every witness to testify to that.

MR. HOWARD: Well, it's a matter of weight, Your Honor, as to who they want to believe, It's a matter of credibility. These people are all charged with felonies, Your Honor, and I thing they have a right to testify that they're innocent and why.

THE COURT: Is this witness charged in this case?

MR. WHEELER: Yes, he is, Your Honor.
THE COURT: All right. You may ask him.
MR. HOWARD: Thank you, Your Honor. (T. 342.)

Further examples of the Judge's intemperance:

Q Well, here is load number 2362 which is a scale load.
A Yes
MR. WHEELER: Your Honor, he's coaching the witness now.
THE COURT: Yes, he certainly is.
MR. HOWARD: Let me withdraw the question.
THE COURT: The objection is sustained and you're all through on that now. (T. 365)

* * *

THE COURT: Step down. Call your next witness.
MR. HOWARD: Your Honor, I have some telephone calls to make if I have another witness to call. I have other witnesses here, of course. I just need a recess. May I inquire of the court how long we will go because I will schedule witnesses accordingly.
THE COURT: Well, you better have all your witnesses here. I need to conclude this case today.
MR. HOWARD: I have one witness in Washington that I didn't think—when I talked to him, I didn't think we were going to try it on Saturday.
THE COURT: Well, the "Don't Thinks" don't count.
MR. HOWARD: Well, I appreciate that, Your Honor. (T. 368–369).

* * *

When the government had rested on *Saturday* morning, after two days of trial and seven witnesses, the defendants were ordered to proceed. By 5:12 p.m., defendants had called 12 witnesses. At that time the following colloquy occured:

MR. HOWARD: Your Honor, I have approximately five more witnesses.
THE COURT: Call your witnesses.
MR. HOWARD: But they'll be very brief, but I don't have any of them here. I didn't know we were

going past five, and I didn't appreciate we were going on Saturday, and I can't locate them. They're in various parts of the state and one of them is from Seattle, Washington. He's flying here but he isn't here now. It's now 5:12 Your Honor, and we've had an hour for lunch and I've run rather rapidly. The government took more than one day.
THE COURT: Well, the rule in this court is when you say ready to the trial of this case when the trial opens, we understand that you're ready. Now, ladies and gentlemen of the jury, I'm going to let you go out there while I talk about this.
(Whereupon the jury left the courtroom).
THE COURT: I do not see any justification for any predicament that you're in at all, not in the least. We're here to try your lawsuit. I have this jury here. The government's here with its witnesses, and I have expected you to be here with yours. And it comes as a very great surprise to me that you now tell me you have five witnesses not here. There's just no excuse for that.
MR. HOWARD: Well, I've proferred the only excuse I have, Your Honor. I've called—I can't remember how many witnesses today, but I believe that I could count them. I've called one—
THE COURT: Well, it doesn't make any difference and you don't need to count the witnesses you've called. You either have those witnesses here and we proceed, or we'll proceed without.
MR. HOWARD: Well, Your Honor, I don't have them because I had no reason to anticipate that we would do it longer than a normal day. I've worked hard. I've been working from five in the morning until eight at night, and I've made a reasonable effort to tell the witnesses that they had to be here on Saturday. I didn't know until late yesterday that I was going to be trying this case on Saturday. I've broken my back to get the witnesses here and I can't do it. Now, if I can't present them, I can't present them and I can be barred from doing so. But I respectfully state to the court that I have and I've had my clients trying all day to reach the following witnesses which I would like to call. I have tried to reach Mr. Howard Mair and I can't reach Mr. Mair. I have Mr. William Bill Thomas—
THE COURT: Now, just hold on. If he were here what would he testify to?
MR. HOWARD: Mr. Mair would testify that he drove the blue truck and that he drove it from that yard

and he drove it down to the mill, and that he at no time had an overload and he drove a good share of those loads.

MR. HOWARD: He was an employee and he never had an overload and he never had a false number and he never fixed a load and the scale loads weren't different than the non-scale loads is what he'll testify. And sometimes they took two tickets off of the rack and that would be material testimony.

THE COURT: Well, as an employee of your client, you had control over him. He could have been here. He should have been here.

MR. HOWARD: He's no longer an employee of my client. Furthermore, Your Honor, this is not the Leavitt Lumber Company on trial. It's these three defendants. They have no control over these people.

THE COURT: You're not going to get anywhere getting angry and arguing with me. What I want you to do, if you can, without being insulting is to tell me who are the witnesses and what they would testify to if they were here.

MR. HOWARD: All right, Your Honor.

THE COURT: The one you've mentioned, where does he live?

MR. HOWARD: He lives in Kamas, Your Honor.

THE COURT: Well, he should be here. Everybody else is including the Mayor, including the commissioner, including the Bishop. They're all down here. Now, why isn't this former employee down here?

MR. HOWARD: Because I can't locate him. I had him squared away for yesterday.

THE COURT: I'll call your attention to one other thing and that is that this case was filed — give me the file day on that.

THE CLERK: November 17, 1976.

THE COURT: That was filed a year ago.

MR. HOWARD: Your Honor, I had him scheduled for trial. I've had him ready since Wednesday. Wednesday, Thursday and Friday I could have produced him. I didn't believe we were going on Saturday. This is the first time I've tried a lawsuit on Saturday in my life and I've been practicing twenty-seven years. I'm sorry that I didn't have him here, but I made a reasonable honest, decent effort as a lawyer to get him here, and I'm very respectful for this court. I have high regard for Your Honor, and I don't mean to be disrespectful.

THE COURT: Well, my view of that witness is you should have had him here, and there's no excuse offered for his not being here. Now, what is the next one?

MR. HOWARD: The next witness is William Bill Thomas. He's an employee of ours and he was to be here, and we told him to stand by, and I told him on Friday that we would call him Monday. We tried to reach him last night and we couldn't reach him.

THE COURT: Did you have him under Subpoena?

MR. HOWARD: No, I did not, Your Honor, nor did I have the other witnesses who I am about to read to you. I have Mr. Ward Blazzard

THE COURT: Well, now, hold on a minute. We're talking about the one who's an employee.

MR. HOWARD: Yes, sir.

THE COURT: Is he presently an employee?

MR. HOWARD: He's an employee of the Leavitt Lumber Company. He is not an employee of any of my clients.

THE COURT: Well, your clients are the Leavitt Lumber Comapny.

MR. HOWARD: No, they're not, Your Honor.

THE COURT: Well, who owns the Leavitt Lumber Company?

MR. HOWARD: The Leavitt Lumber Company is owned primarily by Dale Leavitt and his wife Mona Leavitt.

THE COURT: And are they defendants?

MR. HOWARD: They are not defendants.

THE COURT: Well, do you mean to tell me in this family that those two people wouldn't have produced that witness if you'd wanted him produced here?

MR. HOWARD: They certainly will, Your Honor. They will do that and they've tried and we had him ready to come.

THE COURT: I see no excuse. No Subpoena. The family members own the Leavitt Lumber Company. They have control over this fellow. He's an employee and he isn't here. What's the next one?

MR. HOWARD: The next witness is Mr. Ward Blazzard. Mr. Blazzard is a lumber man from Kamas, and his testimony would be that you can't scale a log by looking at a picture. His testimony would be that these logs are of normal size loads, probably do not exceed five thousand board feet in dimensions or seventy-

eight thousand pounds in weight. He would testify that Stanley Leavitt, Glen Leavitt and Lee Johnson are respectable people in the community in which they live.

THE COURT: All right. That evidence is all cumulative.

MR. HOWARD: That's true, Your Honor.

THE COURT: All right. We don't need that witness.

MR. HOWARD: That's right, Your Honor. I do need that witness, but I understand it's cumulative. The next witness I have is Mr. Richard Hawkins. Mr. Hawkins is a certified public accountant. Mr. Hawkins resides in Provo. His task is to determine the amount of board feet that was run through the mill, and we'll relate it back showing the mill losses to the timber mill sale, to the timber Mill Hollow sale. His testimony, in my judgment, is important. Then I have as another witness Mr. Arlo Johnson who is a master scaler from Seattle, Washington. Mr. Johnson plans to be here Monday. I told him to be here Monday because I didn't think there was any possible way that we could get him on Friday based upon the fact that the government hadn't rested their case Friday. And I didn't think they'd get through Friday and they didn't. I didn't realize that I'd be required to put my case on in one day on a Saturday. Now, I haven't had as much time as the government, and I've done as good as I can do to get my witnesses here. And I might mention, Your Honor, if it means anything, I'm exhausted. It's now 5:20. I've been up since five o'clock every morning this week working on this case. It's an exhausting case. There's a tremendous amount of evidence, and I just don't have the physical stamina to go through another hour or two to produce witnesses and try a lawsuit.

THE COURT: Well, it looks to me as though you have no excuse.

MR. HOWARD: I submit that I've done the best I can and I'll abide by the court's ruling.

THE COURT: Mr. Wheeler.

MR. WHEELER: Your Honor, I would ask the court for purposes of appeal in this case to allow Mr. Howard to go until Monday to get his witnesses here. I don't think that he has an excuse since he didn't subpoena these witnesses, but still I think that we would run into possible problems on appeal if

THE COURT: Well, that's all right. I don't think the trial court ought to run his court on the basis of what some other court might do. He ought to run his court on the basis of the law. You've taken an unnecessarily long time with your examination of these witnesses. It's been repetitious and cumulative, and if we're not farther along today it's very largely due to your delays. The record will show that. Bring the jury in.

* * *

(Whereupon this was recessed at 5:27 p.m.) (T. 456-464).

* * *

Q Did you tell him that if he didn't make a statement to you he would go to jail?

A No, sir.

MR. WHEELER: That's the second time that's been asked, Your Honor.

THE COURT: Yes. Now, we don't have all day to do this. Let's get on with it.

MR. HOWARD: I have no further questions, Your Honor.

MR. HOWARD: I might mention, Your Honor, we have a witness as to the voluntariness of it, and when he's through with this witness, I'd like to put on two witnesses as to the voluntariness of that confession.

THE COURT: Well, get on with it. Step down.

An equally incredible aspect of the conduct of Judge Ritter at the trial is the fact that he overruled at least 47 objections of the defendants, sustained some 70 objections of the prosecuting attorney and interjected his own objections some 17 times. On the other hand, he only sustained two objections of the defendants and only overruled one objection of the prosecution. Mr. Wheeler, the prosecuting attorney avoided some nine additional objections of the defendants by changing the question prior to any ruling by the judge. (Page numbers of each of the above categories of objections are listed in the Appendix attached hereto).

The trial court was no more courteous to defense counsel in ruling on objections than it was in attempting to speed the course

of the trial. Following are examples of some of the interchanges that occurred:

MR. HOWARD: Your Honor, I'd have no objection if he pointed out the particular provisions in the contract because I think that's the best evidence, but I would object to editorializing what the contract says.

MR. WHEELER: If Mr. Jackson feels that the explanation is not accurate, he can point out terms of the contract.

THE COURT: Sustained.

THE WITNESS: The contract calls for volume to be paid for is what is actually cut and removed from the timber sale, and the system we use in this sale is a sample truck load.

MR. HOWARD: Well, now, Your Honor, maybe I misunderstood. I thought you sustained the objection.

THE COURT: Your objection is overruled.

MR. HOWARD: Beg your pardon. The Court said sustained and I thought—

THE COURT: Well, I was sustaining Mr. Wheeler. (T. 17-18).

* * *

Q Were you the one that recommended that an investigation be conducted as to the activities of Leavitt Lumber?

A Yes. I was involved in that recommendation.

Q Can you tell us why you made that recommendation?

MR. HOWARD: Object to that as conclusionary.

THE COURT: What was the question?

MR. WHEELER: This witness testified that he was the one that made the recommendation to investigate Leavitt Lumber, and I asked him what caused him to make that recommendation.

MR. HOWARD: And I say I object to the question because it calls for a conclusion of the witness, of intent and motive and purpose and isn't relevant.

THE COURT: Well, of course, he can tell us. Objection overruled. It isn't a conclusion at all. (T. 34-35).

Q What else, if anything, did you observe that caused you to request an investigation?

A I observed some of the scale envelopes, the sample scaling envelopes, that appeared to be torn off

with identical tear marks as if someone was tearing two envelopes at the same time.

MR. HOWARD: Your Honor, I object to that because that's a mere suspicion, a casual observation, no foundation laid for that testimony. It's merely to incite the jury. We object to it.

THE COURT: I want you to stop that conversation in front of this jury. You've been talking about inciting the jury. That's what you're doing. Now, if you want to make any comments about this, you make them out of the presence of the jury. Your objection is overruled. Proceed.

MR. HOWARD: Your Honor, I don't want to incur the wrath of the Court. I'm merely trying to comply with the rules of procedure.

THE COURT: Just don't be using such words as "incite."

MR. HOWARD: All right, Your Honor.

THE COURT: The Government is entitled to put its case on without being charged with improper conduct here. Proceed, Mr. Wheeler. (T. 38-39).

* * *

MR. HOWARD: We offer Exhibit 9.

MR. WHEELER: Is this a prospectus that related to this contract with the Leavitts?

THE WITNESS: No, it is not. This is—excuse me, it's the resale of the volume that was in the woods at the time that the sale was closed.

MR. WHEELER: I don't see the relevancy of a document showing resale of additional material in the forest. If he wants to put in the prospectus relating to this particular contract, I have no objection.

MR. HOWARD: May I address myself to it, Your Honor. The pont is he's testified as to what was in the forest when the Leavitt Lumber was put out. All of that information is in this prospectus, and I want to demonstrate that there is a gross discrepancy between his testimony from the witness stand and the facts contained in the prospectus.

THE COURT: Objection is sustained.

MR. WHEELER: I have no objection to him showing any inconsistency between his statement and the statement of the witness if he can do that.

MR. HOWARD: I feel obligated to abide by the court's ruling, Your Honor.

THE COURT: You're offering an exhibit. The objection is sustained to that. Now, if you want to do what Mr. Wheeler suggested, go ahead.

MR. HOWARD: Thank you very much, Your Honor.

THE COURT: You're so welcome.[4]

MR. HOWARD: Well, Your Honor, I have great respect for this court and for the Judge and I don't mean to be disrespectful. I didn't mean to imply any disrespect whatever. (T. 78,79).

By this point in the trial proceeding, it became obvious that Judge Ritter was extremely angry with counsel for the defendants and he began to make caustic and sarcastic comments at every opportunity. An analysis of the record shows that no further objections of defense counsel were sustained nor were any of the objections of Mr. Wheeler overruled. While space does not permit a recitation of every incident occurring between the court and defense counsel, the following are typical examples of the conflict.

MR. WHEELER: These are the same questions that Mr. Howard was asking the witness. I think I'm entitled to ask them, too. He was asking the witness' opinion as to the contract terms.

MR. HOWARD: But I never asked that question and the reason for that is the contract itself tells when title passes, not this man's opinion. I think that I have established that title passed, but I don't think his opinion—

THE COURT: You asked him straight out when title passed, do you remember?

MR. HOWARD: I asked him if—

THE COURT: Yes, you asked him. Your objection is overruled. you may pursue it, Mr. Wheeler. (T. 115). [The actual questions asked by Mr. Howard on direct examination are found at pages 63 through 64 of the record].

* * *

[4]The demeanor and tone of Judge Ritter's voice cannot be accurately described except to say it was acrimonious and sarcastic. For this reason, defendants have designated the Court reporter's tape recordings of the trial as additions to the record on appeal.

Q Well, whoever knew that there were fifteen scale numbers in June would have had to have pulled seventy-five of those tickets out in order to get fifteen scale numbers because they were one-to-five, isn't that true, Mr. Carraway?

MR. WHEELER: Your Honor, that assumes the fact that they got it out of the ticket box which is not in evidence at this point.

THE COURT: Yes. The objection is sustained, and I wish you'd quit repeating yourself so often. You asked that question about five times. Now, don't do that.

Q (By Mr. Howard) Mr. Carraway, you go on and you say "The numbers in the paper turned out to be scale load numbers." Now, I'm asking you if that didn't occur to you to be incredible for some reason or another.

A Yes, it did.

Q And the incredible part about it was that the minute you knew a scale number, it was a scale number, it never had to turn out any other way. It wasn't something that depended on a subsequent event, isn't that true?

THE COURT: This is argumentative. It's argumentative.

MR. HOWARD: All right. I submit I'm testing the credibility of this witness, Your Honor.

Q (By Mr. Howard) You wrote that down and you thought there was nothing wrong with that type of comment, is that true.

A That's what he told me.

Q Did you find any part of it unbelieveable or incredible?

MR. WHEELER: Your Honor, it's immaterial. This does not test his credibility.

THE COURT: Sustained. The question is stricken from the record. The jury is instructed to disregard it.

Additional Statements by Judge Ritter:

THE COURT: Yes. Mr. Jackson is testifying and Mr. Jackson has made a mistake in testifying because what Mr. Jackson has said is to be wholly disregarded by the jury. Just put it out of your thinking entirely, these statements he's been making about a time and a place and a situation that the witness says he doesn't

know anything about and he still goes on asking the question. Now, just disregard those questions. (T. 50).

* * *

Q Well, let me see if I can't—just a moment. I'll take the exhibit over there right next to you.

THE COURT: No, you won't. Leave that exhibit right there where we can all see it. The witness can go over there.

MR. HOWARD: All right. Thank you, Your Honor.

Q (By Mr. Howard) Can you see the exhibit from where you stand? (T. 153).

* * *

Q (By Mr. Howard) Mr. Carraway, I was asking you if you knew how the box operated, the ticket box. Do you know how it functions? If I may without damaging any of the furniture—

THE COURT: Don't scratch that table now.

MR. HOWARD: I'll try not to, Your Honor.

THE COURT: Well, trying not to isn't going to satisfy this court. I'll hold you responsible for buying us a new antique mahogany table if you scratch that one up. (T. 236-237).

* * *

THE COURT: Sustained. All you have to do is call them to my attention. I'm not going to permit that sort of testimony.

MR. HOWARD: We suggest, Your Honor, it's a matter of credibility. I'm trying to establish credibility.

MR. WHEELER: Your Honor, you cannot bolster a witness's testimony by his background, his religion or anything else.

THE COURT: No, Now, I'll tell you something, Mr. Howard, I told you not to argue these rulings with me.

MR. HOWARD: All right, Your Honor.

THE COURT: The jury will wholly disregard those side remarks of Mr. Howard. Don't go into the matters you were asking about. (T. 336-337).

* * *

THE COURT: Well, here we go again, a big conversation before this jury. Will you go out to the jury room and rest yourselves for just a very short while. (T. 402).

* * *

THE COURT: Your objection is sustained. The jury is instructed to disregard counsel's question, and you will cease putting the answers in the witness's mouth. Let him testify. (T. 417).

* * *

THE COURT: Yes. It's too much narration, too much argument. (T. 441).

* * *

THE COURT: If you will cease making speeches before this jury. Now, if you want to make a speech, let me know and we'll send the jury out of the room. (T. 448). Compare (T. 497-498).

* * *

Q Yes, copies of this book. Do you know whose book this is?

A I presume it's the book—

MR. WHEELER: Your Honor, it's immaterial if this witness knows whose book it is. We have testimony whose book it is.

THE COURT: Sustained.

Q. (By Mr. Howard) Well, you don't know whose book it is. The only thing you know—

MR. WHEELER: That's the same question, Your Honor.

THE COURT: Sustained. Leave that now.

Q (By Mr. Howard) Do you know what loads these pertain to?

A I can make a calculated guess.

Q What loads do you think they are?

A I believe they're load 2382 and 2383.

Q Do you know which of these defendants made that book?

MR. WHEELER: Your Honor, the jury knows which of the defendants did.

THE COURT: Sustained. (T. 588-589).

* * *

THE COURT: Now, what's that got to do with this lawsuit?

MR. HOWARD: Your Honor, I'm building up to—

THE COURT: Well, get there. (T. 607).

* * *

And, in an argument outside the presence of the jury concerning the Government's rebuttal evidence, the following occurred:

> MR. HOWARD: Your Honor, if this witness were able to testify—and you've heard him testify, he'll testify that this man has a second grade level competence.
>
> THE COURT: I don't believe it.
>
> MR. WHEELER: Even if that were true, how does that affect the weight of the evidence?
>
> MR. HOWARD: The jury has a right to determine how much credence to put to that confession, and I believe I'm entitled to demonstrate that.
>
> THE COURT: Do you object to this?
>
> MR. WHEELER: Your Honor, rather than argue about it—
>
> THE COURT: Well, here I've heard that argument before, too.
>
> MR. WHEELER: I can't see the relevancy, but if Mr. Howard feels he can develop some line of questioning showing the weight—
>
> THE COURT: My goodness gracious sakes alive. We ought to stand on principle here.
>
> MR. WHEELER: I don't think the I.Q. of a man has anything to do with the weight of the evidence.
>
> THE COURT: Neither do I. I'm prepared to sustain an objection.
>
> MR. WHEELER: I will make an objection to that line of questioning as to his I.Q. (T. 598–599).

Finally, at one point Judge Ritter questioned Mr. Larry Taylor at length about the "method of cheating the Government," (T. 106–111), which tended to emphasize the Judge's belief that the defendants were guilty. To do so was reversible error. See *United States v. Guglielmini*, 384 F.2d 602 (2nd Cir. 1967).

The New York Court of Appeals in *People V. De Jesus*, 42 N.Y.2d 519, 399 N.Y. Supp. 2d 196 (1977), dealt with a similar

case where the trial was punctuated by caustic, snide and sarcastic remarks by the Judge directed at defense counsel. The comments in that case were similar to Judge Ritter's, although not so many nor so vitriolic.

After discussing the general role of a trial judge, including the necessity that he take an active role in a jury trial, the New York Court of Appeals stated:

> While such an active participation is not foreclosed, care should be assiduously exercised lest the Trial Judge's conduct, in form of words, actions or demeanor, does not divert or itself become an irrelevant subject of the Jury's focus [citing cases]. Stationed above the clamor of counsel or the partisan pursuit of procedural or substantive advantage, the Judge functions in the critical area of regulating the proceedings so as to guide the jury beyond distracting influences and to a reasoned determination on the facts. In this function, the Bench must be scrupulously free from and above even the appearance or taint of partiality [citing cases]. Unnecessary and excessive interference in the presentation of proof, as well as the intimidation or denigration of counsel, particularly in the jury's presence, are to be avoided. Since the presence of the Judge is likely to be equated with the majesty of the law itself, inappropriate remarks which might throw the scales out of balance should be omitted and "care must be taken to guard against 'the possibility that the stated opinion of the trial court or even the suggestion of an opinion might be seized upon by the jury and eventually prove decisive'". [citing cases]. *DeJesus*, supra at 199.

The Court then concluded that the trial judge's comments "burdened the defendant with the obligations, not only of rebutting the proof of the people, but also of countering the implications imputed by the court." The Court stated, that under such circumstances, "the error could not be disregarded as harmless." *DeJesus*, supra, at 199.

The Court in *U.S. v. Coke*, 339 F.2d 183 (2nd Cir. 1964), where the defendant was convicted on three counts for violations of the narcotics laws, held that the trial judge "by excessive interference in the examination of witnesses, by repeated rebukes and disparaging remarks directed at appellant's counsel and by

marked impatience, all in the presence of the jury displayed an attitude of partisanship which resulted in the denial of a fa[illegible]al and a deprivation of due process of law." *Coke*, supra a[illegible]85. (Emphasis added). The Court noting that some of the admonitions of the Court were merited, held that the comments of the judge improperly prejudiced the defense in the minds of the jurors. The Court stated that when mild admonitions to counsel do not suffice, "any sterner or more forceful directions which may have been warranted should have been given in the absence of the jury." *Coke*, *Supra* at 185.

There is nothing in the present record that shows any justification for the excessively abrasive comments of Judge Ritter, but even if there had been justifications, the Court had no right, even under extreme circumstances, to prejudice the defendants by making critical comments to their counsel in the presence of the jury. Certainly such statements by the judge are clearly error.

The rule stated in *Fahy v. Connecticut*, 375 U.S. 85, 85-86 (1963) is that such error is not "harmless" if there is a "reasonable possibility" that the matter complained of might have contributed to the conviction. *See also U.S. v. Guglielmini*, supra.

In *Young v. U.S.*, 346 F.2d 793 (D. C. Cir. 1965), the Court, noting the frequent interruptions by the trial court to criticize counsel reversed the conviction on the following grounds:

> The Court's continual intervention may well have "tended ... to unnerve [each defense counsel] and throw him off balance so that he could not devote his best talents to the defense of his client." United States v. Kelley, 314 F.2d 461, 463 (6th Cir. 1963). *Even if there had been a basis for some of the criticism of defense counsel, this would not justify continuous interruption.* "In a jury case, a trial judge should exercise restraint and caution because of the possible prejudicial consequences of the presider's intervention." [citing cases]. (Emphasis added.)

See also U.S. v. Guglielmini, supra.

Likewise, the Court in *Killilea v. U.S.*, 287 F.2d 212 (1st Cir. 1961) reversed the conviction because the conduct of the judge denied the defendants a fair trial. The Court noted that:

> The comments of the judge as they appear in the record often would have been questionable even coming from a prosecuting attorney. *The only difficulty government counsel had with the court was in restraining it from going too far in the government's favor. Defense counsel's difficulties were quite different. Defendants were constantly restricted, sometimes beyond any bounds of discretion. Evidence offered by them was ruled out even without objection by the government—or after objection was invited by the court—while the only interruption of the government's examination was to ask counsel.* Cross-examination of government witnesses was continually cut off—in some instances when it was apparent that the court could not have known what the question was going to be. Defense witnesses, on the other hand, were subjected to rigorous cross-examination by the court itself. When it would have been altogether too blatant to cut off cross-examination of government witnesses, the court frequently interrupted at important moments, giving the witness an opportunity to recover himself, or would itself supply the answers, or explanations, effectively destroying the cross-examination. (Emphasis added.)

It should be noted that Judge Ritter's trial demeanor has been sharply criticized in the past—both by the Government and by defense counsel. See *United States v. MacKay*, 491 F.2d 459 (10th Cir. 1976); and *United States v. Bray* 546 F.2d 851 (10th Cir. 1976).

It should be noted that the degree of partiality, bias and criticism in the present case has no equal in any of the previous cases and further, there was no attempt in this case to remedy the situation with a prompt curative instruction to the jury. See *U.S. v. Munz*, 542 F.2d 1382 (10th Cir. 1976).

The Court established in *U.S. v. Bray*, 546 F.2d 851 (10th Cir. 1976) that:

> A trial judge has both great responsibility and discretion in conducting the trial of a case. He should be the exemplar of dignity and impartiality. *He must exercise restraint over his conduct and statements in order to maintain an atmosphere of impartiality.* We are cognizant of the strain and emotional stress imposed upon a trial judge who is endeavoring to conduct the trial in a firm, dignified and restrained manner when he is confronted by a litigant, who, like Bray, treats him with disrespect and who openly insults and humiliates

> him. *Even so, it is prejudicial error for the judge to make remarks that clearly import his feelings of hostility toward the defendant.* The remarks of the trial judge relative to Bray's bond, with the inferences which must be drawn, cannot be justified or rationalized as fair and impartial. These remarks constitute plain error. Fed. Rules Crim. Proc., Rule 52(b), 18 U.S.C.A.; United States v. MacKay, supra; United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971). (Emphasis added.)

See also *Webbe v. McGhie Land Title Company*, 549 F.2d 1358 (10th Cir. 1977).

The conduct of Judge Ritter "affected the substantial right of the defendants" to adequate representation by counsel, to their right of cross-examination and to their due process rights. *U.S. v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978).

While defendants recognize that in *United States v. Redmund*, 546 F.2d 1386 (10th Cir. 1977), this Court found that Judge Ritter's statements came "close to the line, but [were] still within the permissible bounds," the defendants submit that the conduct of Judge Ritter was much more aggravated in the present case.

Notwithstanding the flagrant prejudicial effect of the court's comments upon the evidence or the conduct of the defendants or their counsel, even more damaging to the defendants was the hostility and sarcasm expressed and apparent in the tone of the Judge's voice or the facial expressions and mannerisms of the Judge when making his rulings or commentaries. What remedy was available to the defendants under such circumstances? Could counsel say, "may the record show that the Court sneered and snarled at counsel" . . . "or the witness"? Of course not. This type of conduct by the Judge was irreparable and prejudicial, and the defendants are afforded no remedy unless this Court attaches some significance to the credibility of counsel and the general reputation of the trial judge.

Nothing is so important to the workings of justice as the dignity of the judicial climate which should permeate the courtroom and its surroundings. In this instance, because impartiality was lacking and because judicial dignity had evaporated, a fair trial was impossible.

APPENDIX

(Numbers refer to page numbers in transcript)

1. OBJECTIONS OF PROSECUTION SUSTAINED: 51, 61, 79, 93, 96, 98, 101, 121, 152 (2), 155, 158, 159, 164, 201, 205, 210, 212 (2), 233, 234, 235, 271, 274, 291, 304, 307, 308, 317, 320, 335, 336, 339, 343, 344 (3), 349, 350, 379, 380 (2), 381, 414, 417, 418, 419, 420, 426, 434, 441, 444 (3), 455, 466, 482, 488, 498, 504, 524, 552, 556, 557, 558, 559, 588, 589 (2), 656.
   TOTAL 70

2. OBJECTIONS OF DEFENSE OVERRULED: 11, 17, 18, 29, 35, 36, 37, 38, 39, 41 (2), 42 (2), 104, 111, 115, 116, 140, 216, 224, 226, 249, 253, 278 (2), 282, 283, 331, 333, 351, 354, 422, 448, 450, 453, 454 (2), 494, 501, 512, 515, 518, 536, 539, 544, 578, 579, 662, 664.
   TOTAL 49

3. SPONTANEOUS OBJECTIONS BY JUDGE TO DEFENDANTS' PRESENTATION: 117, 120, 165, 203, 209, 298, 299, 301, 312, 319, 320, 321, 342, 361, 367; 401, 592.
   TOTAL 17

4. OBJECTIONS OF PROSECUTION OVERRULED: 65
   TOTAL 1

5. OBJECTIONS OF DEFENSE SUSTAINED: 35, 617
   TOTAL 2

6. PROSECUTION CHANGED QUESTION ON OBJECTION OF DEFENSE WITHOUT RULING OF JUDGE: 16, 20, 37, 114, 176, 179, 495, 564, 614.
   TOTAL 9